Supreme Court, U.S.
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NO. 09-897

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IN THE

SUPREME COURT OF THE UNITED STATES

ARMANDO NARCISO-CABRERA,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Ninth Circuit's panel decision in *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003), as applied to Petitioner, serve as a constitutionally impermissible infringement upon legislative authority?

2. Is the Ninth Circuit's panel decision in *Vasquez-Lopez* in conflict and inconsistent with other decisions of the Ninth Circuit, its sister Circuits, and the BIA, such that it substantially affects a rule of national application in which there is an overriding need for national uniformity?

3. Has the Ninth Circuit's panel decision in *Vasquez-Lopez* decided important questions of federal law — affecting hundreds, if not thousands, of nonpermanent residents — that have not been, but should be, settled by this Court?

4. Did Congress delete the subjective "brief, casual, and innocent" exception and replace it with an objective bright-line rule in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996?

5. Is Section 1229b(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 unambiguous?

6. Is the BIA's reading of Section 1229b(d)(2) in *In re Romalez-Alcaide*, 23 I. & N. Dec. 432 (BIA 2002), flawed, contradictory, and unworthy of deference?

7. Does a voluntary departure constitute a break in continuous physical presence, where there is no evidence demonstrating that the petitioner understood that a voluntary departure would constitute a break as applied under *Vasquez-Lopez*, particularly where *Vasquez-Lopez* was decided after the petitioner voluntarily departed?

8. Assuming *arguendo* that a voluntary departure constitutes a break, does a petitioner nonetheless satisfy the threshold presence requirement if the petitioner has

accumulated more than 10 years prior to a voluntary departure?

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Petitioner Armando Narciso-Cabrera ("Armando") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in docket number 08-73249 on May 29, 2009 in an unreported decision and order. *See* May 29, 2009 Order (the "Panel's Order"), attached hereto at Appendix A.

On March 16, 2007, the immigration judge found Armando ineligible for cancellation of removal because he voluntarily departed — *for only twenty days* — in April 2002. *See* March 16, 2007 Decision And Order (the "IJ Decision"), attached hereto at Appendix B.

On June 30, 2008, the Board of Immigration Appeals (the "BIA") dismissed Armando's appeal on the same grounds. *See* June 30, 2008 Decision Of The Board Of Immigration Appeals (the "BIA Decision"), attached hereto at Appendix C.[1]

On May 29, 2009, the Ninth Circuit summarily denied Armando's petition for review in an unreported decision and order. *See* Panel's Order (Appendix A) at 2a-3a.

On July 30, 2009, the Ninth Circuit granted Armando's motion for an extension of time to file a petition for panel rehearing and/or a petition for rehearing *en banc*. *See* June 30, 3009 Order (the "Extension Order"), attached hereto at Appendix D.

On October 26, 2009, the Ninth Circuit summarily denied Armando's motion for reconsideration or

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[1] Although the BIA also affirmed because "[t]he Immigration Judge also stated that he would deny cancellation of removal as a matter of discretion" (BIA Decision (Appendix C) at 14a), the Immigration Judge pretermitted the application and, thus, Armando was never afforded the opportunity to present the merits of his claim, including the hardship to his U.S.-citizen children or the circumstances that required his reentry into the United States. *At a minimum*, due process demands an opportunity to present a claim for relief before it can be denied on discretionary grounds.

reconsideration *en banc* and/or petition for rehearing or rehearing *en banc* in an unreported decision and order. *See* October 26, 2009 Order (the "Rehearing Order"), attached hereto at Appendix E.

JURISDICTION

The Ninth Circuit entered its judgment for docket number 08-73249 on May 29, 2009 in an unreported decision and order (*i.e.*, the Panel's Order (Appendix A)).

The Ninth Circuit entered its order denying reconsideration and/or rehearing for docket number 08-73249 on October 26, 2009 in an unreported decision and order (*i.e.*, the Rehearing Order (Appendix E)).

This Court has jurisdiction to review the Panel's Order on a writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 1229b(d)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") establishes an objective bright-line rule "relating to" continuous residence or physical presence:

> Treatment of certain breaks in presence
>
> An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

8 U.S.C. § 1229b(d)(2).

STATEMENT OF CASE

A. Introduction

President Barack Obama and the United States Secretary of Education recently presented Armando's

eleven year-old son — *a U.S. citizen* — an award for "Outstanding Academic Achievement." *See* President's Education Awards Program Certificate, attached hereto as Appendix F. President Obama also commended Armando's son for his commitment to academic excellence and hard work, and recognized Armando's son as a future American leader:

> I am delighted to join your family, friends, and community in congratulating you on receiving the President's Education Award. By earning this honor, you have shown a deep personal commitment to educational excellence and I commend you for your hard work.
>
> Nothing is more important to our Nation's long-term success than educating our future leaders. Your commitment to learning will help you meet the educational and professional demands in your future and will help lead America to a better day.
>
> I am confident that you will build on this achievement as you strive for even higher goals in the future. I wish you all the best for continued success in the years ahead.

See President Obama's February 27, 2009 Letter, attached hereto as Appendix G.

If this Court does not grant Armando's petition for writ of certiorari, Armando's only remaining option for challenging his expulsion from the United States, *where he has resided for nearly twenty-four years*, will be extinguished and Armando's family, *including Armando's son who was recently honored by the President*, will be subjected to the devastating and heart-breaking consequences of a forced departure from this country. More importantly, if this Court does not reverse the erroneous Panel's Order, Armando's gifted son will be deprived of the opportunity to continue his academic journey in the United

States and fulfill the promise of becoming a future American leader, as recognized by President Obama.

B. Relevant Background

Armando is an honest, hard-working father of three U.S.-citizen children. From the moment he first entered this country nearly twenty-four years ago, Armando established firm roots evidencing a strong commitment to permanently reside in the United States. Anyone who knows Armando would say, and testify, that he is a caring family man of the utmost moral character. He has never been convicted of any crime, except for a DUI. And Armando and his family are firmly established in their community such that removal would result in exceptional and extremely unusual hardship. In fact, in addition to having been honored by President Obama, Armando's eleven year-old son was recently accepted into a magnet school for academically advanced students, after having been encouraged to apply by his teachers. *See* Los Angeles Unified School District Gifted/Talented Programs Notification, attached hereto as Appendix G.

Most of the above facts, however, are not in record, because the merits of Armando's application for cancellation of removal has never been addressed. Instead, relying on *Vasquez-Lopez v. Ashcroft*, 343 F.3d 961 (9th Cir. 2003), the immigration judge found Armando ineligible for cancellation of removal because he voluntarily departed — for only twenty days — in April 2002. *See* IJ Decision (Appendix B) at 9a. The BIA dismissed Armando's appeal on the same grounds. *See* BIA Decision (Appendix C) at 14a.

On May 29, 2009, the Ninth Circuit, in an unreported panel decision, denied Armando's petition for review. *See* Panel's Order (Appendix A) at 3a. The Panel's Order summarily denying Armando's petition for review also rests entirely on *Vasquez-Lopez*, which in turn rests on *In re Romalez-Alcaide*, 23 I. & N. Dec. 432 (BIA 2002). But both *Vasquez-Lopez* and *Romalez-Alcaide* are the subject of

vigorous dissents, and the statutory construction adopted by the *Vasquez-Lopez* panel and *Romalez-Alcaide* majority conflicts and is inconsistent with other decisions of the Ninth Circuit, its sister Circuits, and the BIA.

Moreover, the evolution of Section 1229b(d)(2) of IIRIRA demonstrates that Congress knew precisely how to mandate exceptions (whether subjective or objective in nature) to the continuous physical presence requirement. The fact that Congress deleted the subjective "brief, casual, and innocent" exception and replaced it with an objective bright-line rule is telling, and should have ended the inquiry. This Court should review the Ninth Circuit's erroneous panel decision to address the conflicts and inconsistencies that have festered since *Vasquez-Lopez*.

C. History Of Statutory Language

Prior to 1940, the Attorney General had no discretion in deportation proceedings. *See INS v. Wang*, 450 U.S. 139, 140 (1981). In 1940, Congress authorized the Attorney General to suspend deportation of aliens of good moral character whose deportation "would result in serious economic detriment" to the aliens or their families. *See* 54 Stat. 672. In 1948, Congress amended the statute again to make suspension available to aliens who "resided continuously in the United States for seven years or more," regardless of family ties. *See* 62 Stat. 1206. Then, in 1952, Congress replaced the seven year "continuous residence" requirement with a "continuous physical presence" requirement. *See* 66 Stat. 214.

In 1981, the Ninth Circuit created an exception to the continuous physical presence requirement for non-"meaningfully interruptive" departures. *See INS v. Phinpathya*, 673 F.2d 1013, 1018 (9th Cir. 1981). In 1984, this Court reversed, finding that the Ninth Circuit had improperly disregarded the plain words of statute. *See INS v. Phinpathya*, 464 U.S. 183, 189-90 (1984). Congress amended the statute after *Phinpathya* to provide an exception for absences that were "brief, casual, and

innocent" and did not "meaningfully interrupt" an alien's continuous physical presence. *See* 8 U.S.C. § 1254(b)(2) (repealed 1996). The legislative history behind the amendments "makes clear that Congress intended to abrogate the strictness of the holding in *Phinpathya*" by adopting the "*Fleuti* doctrine." *Degrules v. INS*, 833 F.2d. 861, 862 (9th Cir. 1987). Under the *Fleuti* doctrine, the test is subjective, requiring an examination of the circumstances surrounding the departure to determine whether there was "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." *Rosenberg v. Fleuti*, 347 U.S. 449, 462 (1963).

In 1989, the Ninth Circuit concluded that a voluntary departure under threat of deportation is "not a brief, casual, and innocent absence from the United States." *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989). In 1996, Congress eliminated the subjective "brief, casual, and innocent" exception, substituting an objective bright-line rule:

> An alien shall be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

8 U.S.C. § 1229b(d)(2). In 2002, despite Congress's deliberate alterations to the continuous physical presence requirement, the *Vasquez-Lopez* panel read the subjective "brief, casual, and innocent" exception back into the statute.

D. Ninth Circuit's Jurisdiction

The Ninth Circuit had jurisdiction to consider Armando's petition for review under 8 U.S.C. § 1252.

ARGUMENT

A. *Vasquez-Lopez* Conflicts And Is Inconsistent With Other Opinions Of The Ninth Circuit, Its Sister Circuits, And The BIA

The panel's decision in *Vasquez-Lopez* is directly at odds with the approach taken by the Tenth Circuit when it analyzed the new continuous physical presence requirement of Section 1229b(d)(2). In *Rivera-Jimenez v. INS*, 214 F.3d 1213 (10th Cir. 2000), the Tenth Circuit vacated the BIA's decision, which relied on the old "brief, casual, and innocent" exception. In remanding the question to the BIA, the Tenth Circuit commented: "We agree with the INS that petitioners' two-week return to Mexico in lieu of being placed in deportation proceedings was not brief, casual or innocent.... ***This is irrelevant, however, in light of the IIRIRA's special rules relating to continuous physical presence.***" 214 F.3d at 1218 (emphasis added).

Subsequent to *Vasquez-Lopez*, the Third, Fifth, and the Seventh Circuits have also held that "[t]he 'Fleuti Doctrine'—that an "innocent, casual, and brief" departure from this country does not constitute a break in an alien's physical presence—has been superseded by the IIRIRA." *Tapia v. Ashcroft*, 351 F.3d 795, 799 (7th Cir. 2003). In *Tapia*, the Seventh Circuit recognized that IIRIRA replaces the subjective "brief, casual, and innocent" exception with an objective bright-line rule:

> The physical presence requirements under the IIRIRA does not include the "innocent, casual, and brief" standard, and instead opts for a ***quantitative standard***.

Id. (emphasis added).

Although the Seventh Circuit later commented that "[w]e have no quarrel with *Romalez-Alcaide*'s rule" (*Morales-Morales v. Ashcroft*, 384 F.3d 418, 427 (7th Cir.

2004)), the Seventh Circuit squarely rejected one of the BIA's rationales based on Section 1229b(d)(2)'s title:

> The IJ reasoned that "[i]n light of the ambiguity in the heading" of 8 U.S.C. § 1229b(d)(2)—whose heading is worded "Treatment of *certain* breaks in presence" (emphasis added), rather than "Treatment of *all* breaks in presence"—"the Fleuti doctrine and the concept of meaningfully interruptive departures still exist under the current law."... The IJ's analysis fails to take into account the fact that the Fleuti doctrine was superceded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.... We see no warrant for the IJ to read this statute as establishing only a maximum number of days, rather than a ***bright-line administrative rule***.

384 F.3d at 424 (emphasis added).

Similarly, although a month after the panel's decision in *Vasquez-Lopez* the Fifth Circuit stated that "we agree with *Vasquez-Lopez*" (*Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 219 (5th Circuit 2003)), in a more recent decision concerning IIRIRA's alterations to certain "admissions" requirements, the Fifth Circuit held that "IIRIRA superseded the Fleuti doctrine and its ***intent test***.... The plain language of the statute does not allow for the exception found by the Court in Fleuti." *Malagon De Fuentes v. Gonzales*, 462 F.3d 498, 501 (5th Cir. 2006) (emphasis added).

The Third Circuit has also held that the *Fleuti* doctrine was not reincorporated into IIRIRA's "admissions" requirements. *See Tineo v. Ashcroft*, 350 F.3d 382, 396 (3rd Cir. 2003). In *Tineo*, the Third Circuit found particularly instructive Congress's awareness of the *Fleuti* doctrine and its retention of the subjective test in certain sections (but not others):

> Furthermore, notwithstanding the wholesale amendments in the IIRIRA, some existing provisions of the immigration laws retain the language of *Fleuti*.... In light of Congress's apparent awareness of Fleuti and its retention of the innocent, casual, and brief departure doctrine in other immigration statutes, ***the deliberate non-inclusion of that doctrine in § 301(a)(13) is telling.... It is evident that Congress knew exactly how to incorporate and retain the Fleuti doctrine in immigration statutes, but elected not to do so in §301(a)(13)***.

Id. at 392-393 (emphasis added).

Likewise, the BIA has also held that the subjective brief, casual, and innocent standard originating in *Fleuti* did not survive the enactment of IIRIRA, and the BIA declined to read the subjective test into the statute where Congress had not expressly elected to include it. *See In re Collado*, 21 I. & N. Dec. 1061, 1065 (BIA 1998) ("Congress has now amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine"). In *Collado*, the BIA found that the subjective *Fleuti* doctrine was no longer relevant where Congress did not expressly preserve it in IIRIRA:

> We note that Congress is clearly aware of the concept of "brief, casual, and innocent" absences, as it previously incorporated this concept in other provisions of the Act.... However, no general exception for "brief, casual, and innocent" absences was included in section 101(a)(13), as amended by the IIRIRA. ***In fact, the previous use of the "brief, casual, and innocent" concept*** in section 244(b)(2) of the Act, pertaining to eligibility for suspension of deportation, ***was not carried forward by Congress in the***

IIRIRA's new cancellation of removal provisions.

Id. at 1064 n. 4 (emphasis added). *Collado* pre-dates *Romalez-Alcaide*, but the *Romalez-Alcaide* majority makes no attempt to square its earlier decision.

Subsequent to *Vasquez-Lopez*, the Ninth Circuit has also held that, in the context of "admissions" requirements, IIRIRA "abrogated the *Fleuti* doctrine." *Camins v. Gonzales*, 500 F.3d 872, 880 (9th Cir. 2007). In *Camins*, the Ninth Circuit adopted the Third Circuit's reasoning in *Tineo*, including specifically the Third Circuit's finding that Congress replaced certain subjective "brief, casual, or innocent" exceptions with objective rules:

> Finally, the Court observed that while Congress had "retain[ed] the language of *Fleuti*," namely "the operative terms intent, innocent, casual, or brief," in other immigration law provisions, it drafted [IIRIRA] to "delineat[e] six specific scenarios under which a returning alien would be considered an alien seeking admission."

Id. (citing 350 F.3d at 392-93). The Ninth Circuit has also held that "Section 1229b(d)(2) provides a ***bright-line rule*** that an alien 'shall be considered to have failed to maintain continuous physical presence in the United States' if the alien 'has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.'" *Garcia-Ramirez v. Gonzales*, 423 F.3d 935, 939 (9th Cir. 2005) (emphasis added).

Because the jurisprudence that has developed since *Vasquez-Lopez* is riddled with conflicts and inconsistencies, this Court should review the panel's erroneous decision.

B. *Vasquez-Lopez* Improperly Deferred To The BIA's Impermissible Interpretation In *Romalez-Alcaide*

In addition to addressing the many conflicts and inconsistencies, review is particularly appropriate because the *Vasquez-Lopez* panel should not have deferred to the BIA.

The *Vasquez-Lopez* panel incorrectly held that the BIA's "reading of the statute [in *Romalez-Alcaide*] is a reasonable one, worthy of our deference." 343 F.3d at 961. But under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the first step is to consider "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 843).

Here, the *Vasquez-Lopez* panel should not have moved beyond the first prong of *Chevron*, because Section 1229b(d)(2) is clear on its face. Congress could have easily retained the subjective "brief, casual, and innocent" exception to the continuous physical presence requirement; instead, Congress affirmatively deleted the subjective "brief, casual, and innocent" exception and replaced it with an objective bright-line rule. In fact, as discussed above, several Circuits — including the Ninth Circuit — and even the BIA have held that the subjective *Fleuti* doctrine was preserved only where Congress "carried forward" the "brief, casual, and innocent" exception. Accordingly, the BIA's attempt to amend the express language of the statute is impermissible and not subject to *Chevron* deference. *See Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

C. *Vasquez-Lopez* Is Premised On A Faulty And Contradictory Construction Of IIRIRA

Even assuming *arguendo* that Section 1229b(d)(2) is somehow ambiguous, the BIA's construction of IIRIRA is flawed, contradictory, and unworthy of *Chevron* deference for several reasons.

First, the BIA ignores the fact that IIRIRA preserved the "brief, casual, and innocent" exception in two other sections. *See* 8 U.S.C. § 1254a(c)(4) (temporary protected status), 8 U.S.C. § 1255a(a)(3)(B) (adjustment of status for pre-1982 entrants). Thus, the plain language of IIRIRA demonstrates that if Congress had intended to preserve the "brief, casual, and innocent" exception to the continuous physical presence requirement, it knew precisely how to do so. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation marks omitted).

Second, the BIA incorrectly concludes that "the statutory language ... does not literally forgive any single departure of 90 days or less or aggregate departures of 180 days or less." *Romalez-Alcaide*, 23 I. & N. Dec. at 425-26. But this Court in *Phinpathya* reversed a similar attempt to engraft unenumerated exceptions: "The ordinary meaning of these words does not readily admit any 'exception[s] to the requirement of seven years of 'continuous physical presence' in the United States to be eligible for suspension of deportation.... The deliberate omission of a similar moderating provision in § 244(a)(1) compels the conclusion that Congress meant this 'continuous physical presence' requirement to be administered as written." 464 U.S. at 189-90 (citations omitted).

Third, the BIA improperly considers what it called "Related Regulations." *Romalez-Alcaide*, 23 I. & N. Dec. at 427-28. But those regulations implement the Nicaraguan Adjustment and Central American Relief Act of 1997

("NACARA"), which the *Romalez-Alcaide* majority and *Vasquez-Lopez* panel agree apply only to aliens who fall under NACARA — *i.e.*, not the petitioners in *Romalez-Alcaide* or *Vasquez-Lopez* or here. Indeed, the regulations demonstrate that the Attorney General knew precisely how to implement a regulation that explicitly provides that "a period of continuous physical presence is terminated whenever ... the alien has voluntarily departed under the threat of deportation" (8 C.F.R. § 240.64(b)(3)), however, no comparable regulation exists for aliens (such as petitioner here) who fall outside of NACARA's reach. *See Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460-61 (9th Cir. 1997) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law.").

Fourth, the BIA improperly supplants the express language of the statute with its understanding of IIRIRA's purpose. *See Romalez-Alcaide*, 23 I. & N. Dec. at 429 ("Congress sought to deter illegal immigration to the United States by curbing the incentive for aliens to extend their stays in this country and prolong their cases in order to gain immigration benefits."). But IIRIRA's "stop-time" rule specifically addresses the BIA's concern by enumerating the conditions that "shall be deemed to end" any period of continuous physical presence. *See* 8 U.S.C. § 122b(d)(1). Congress could have easily included voluntary departure in the enumerated list, but did not do so. Construing IIRIRA to broaden the Attorney General's discretion improperly shifts authority to define the "continuous physical presence" requirement "from Congress to INS and, eventually, as is evident from the experience in this case, to the courts." *Phinpahya*, 464 U.S. at 195.

Finally, "any lingering ambiguities" should have been construed "in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("we will not assume that Congress meant to trench on [the alien's] freedom beyond that which is

required by the narrowest of several possible meanings of the words used").[2]

D. No Evidence Of A Knowing And Voluntary Departure

Even assuming *arguendo* that the panel correctly found that a voluntary departure constitutes a break in continuous physical presence, there is no evidence in the record (let alone substantial evidence) demonstrating that Armando was informed of the terms of his departure and knowingly and voluntarily accepted them.

The Ninth Circuit has found "an agreement to accept voluntary departure is akin to a plea bargain" and, thus, a voluntary departure breaks the accrual of continuous physical presence only where there is "substantial evidence in the ... record that would support the conclusion that petitioner knowingly and voluntarily accepted administrative voluntary departure." *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619-620 (9th Cir. 2008); *see also Tapia v. Gonzales*, 430 F.3d 997, 1002 (9th Cir. 2005). In the context of appeal rights, courts have similarly held that "[a]n alien's waiver of his appellate rights must be 'knowingly and intelligently made.'" *Narine v. Holder*, 559 F.3d 246, 249 (4th Cir. 2009); *see also United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987) ("Because the waivers of their rights to appeal were not considered or intelligent, respondents were deprived of judicial review of their deportation proceeding.").

Here, except for stray references to Armando's voluntary departure in 2002, the record is void of any evidence concerning the circumstances of Armando's departure. The record does not evidence that Armando understood that his

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[2] The concurring and dissenting opinions in *Romalez-Alcaide* (*see* 23 I. & N. Dec. at 430-447) and the dissenting opinion in *Vasquez-Lopez* (*see* 343 F.3d at 963-969) detail several additional reasons why the BIA's construction of IIRIRA is flawed and unworthy of *Chevron* deference.

voluntary departure would constitute a break, as applied under *Vasquez-Lopez*. Nor could it, because *Vasquez-Lopez* was decided ***after*** Armando voluntarily departed. The record also does *not* evidence that that Armando understood that his voluntary departure would eviscerate the more than 16 years of continuous physical presence he had already accumulated. This is particularly troubling because Armando was *pro se* throughout the proceedings that culminated in his 2002 departure, and there is no evidence in the record demonstrating that Armando knowingly and intelligently waived his right to appeal the BIA's 2002 decision. *See* IJ Decision (Appendix B) at 9a ("Respondent was granted voluntary departure by the Board on March 20, 2002, and timely departed on April 8, 2002.").

Accordingly, where (as here) the application of the panel's (erroneous) decision in *Vasquez-Lopez* would nullify the accumulation of more than 10 years of continuous physical presence, consistent with *Ibarra-Flores*, Armando's petition for review should have been granted and, *at a minimum*, remanded for further proceedings to determine whether Armando was informed of the terms of the departure (*e.g.*, that he would forever be throwing away his more than 16 years of presence) and knowingly and voluntarily accepted them, particularly given that Armando was unrepresented in the proceedings that resulted in his departure. *See In re Rodriguez-Diaz*, 22 I. & N. Dec. 1320, 1322 (BIA 2000) ("[T]he precise articulation of appeal rights required in any given case will necessarily depend on the circumstances of that case.... However, we also recognize that, in cases involving unrepresented aliens, more detailed explanations are often needed.").

E. Armando Was Present For More Than Ten Years

Even assuming *arguendo* that the panel correctly found that a voluntary departure constitutes a break in continuous physical presence, and even assuming *arguendo*

that the record evidences a knowing and voluntary acceptance of the terms of such a departure, Armando accumulated more than 10 years of continuous physical presence prior to his departure.

In *Vasquez-Lopez*, the petitioner had accumulated less than 10 years continuous physical presence prior to his voluntary departure. *See* 343 F.3d at 970. The Panel's Order overlooks this salient fact. Unlike the petitioner in *Vasquez-Lopez*, Armando accumulated more than 16 years of continuous physical presence *prior* to his departure. And his departure was for only twenty days — significantly less than the 90-day statutory maximum. *Vasquez-Lopez* simply does not answer the relevant question here: Whether, assuming *arguendo* that a voluntary departure constitutes a break, does a petitioner nonetheless satisfies IIRIRA's threshold presence requirement if the petitioner has accumulated more than 10 years prior to a voluntary departure? Thus, the panel's reliance in this case on the panel's (erroneous) decision in *Vasquez-Lopez*, is misplaced.

Moreover, the Panel's Order emphasizes the word immediately: "The plain language of 8 U.S.C. § 1229b(b)(1)(A) requires that, in order to qualify for cancellation of removal, an alien must, as a threshold matter, 'have been physically present in the United States for a continuous period of no less than ten years *immediately preceding the date of the application.*'" Panel's Order (Appendix A) at 2a (emphasis in original). But "immediately" cannot be read literally; otherwise, no application for cancellation of removal could ever be granted where the petitioner has received a notice to appear, because under Section 1229b(d)(1) the clock stops "when the alien is served a notice to appear." 8 U.S.C. § 1229b(d)(1). Due to the labyrinth of the immigration rules and procedures, it is not uncommon for applications for cancellation of removal to be filed several months, if not years, following service of a notice to appear. *See, e.g.*, *Elbahja v. Keisler*, 505 F.3d 125, 126-27 (2nd Cir. 2007)

(application for cancellation of removal first filed 11 months after initiation of removal proceedings).

CONCLUSION

For all of the above reasons, Armando respectfully requests that this Court grant his petition for writ of certiorari.

RESPECTFULLY SUBMITTED this 22nd day of January, 2010.

Christopher M. Huck
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Counsel of Record for
Armando Narciso-Cabrera

APPENDIX A

FILED

UNITED STATES COURT OF APPEALS

MAY 29 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLE
U.S. COURT OF APPEALS

ARMANDO NARCISCO-CABRERA, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 08-73249 Agency No. A072-308-084 ORDER

Before: LEAVY, McKEOWN and CALLAHAN, Circuit Judges.

This is a petition for review of the Board of Immigration Appeals' ("BIA") order adopting and affirming an Immigration Judge's order denying petitioner Armando Narcisco-Cabrera's application for cancellation of removal.

The court has reviewed petitioner's response to the February 25, 2009 order to show cause. Departure from the United States under a grant of voluntary departure breaks an applicant's continuous physical presence. *See Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (per curiam). The plain language of 8 U.S.C. § 1229b(b)(1)(A) requires that, in order to qualify for cancellation of removal, an alien must, as a threshold matter, "have been physically present in the United States for a continuous period of no less than ten years *immediately preceding the date of the application*." See 8

U.S.C. § 1229b(b)(1)(A) (emphasis added); *see also Lopez-Alvarado v. Ashcroft*, 381 F.3d 847, 850 (9th Cir. 2004).

A review of the administrative record demonstrates that there is substantial evidence to support the agency's decision that petitioner left the United States under a grant of voluntary departure in 2002, and then subsequently failed to establish continuous physical presence in the United States for a period of not less than ten years immediately preceding the date of his 2006 application for cancellation of removal.

Accordingly, this petition for review is summarily denied because the questions raised by the petition are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

All other pending motions are denied as moot. The temporary stay of removal confirmed by Ninth Circuit General Order shall continue in effect until issuance of the mandate.

PETITION FOR REVIEW DENIED.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: **A 72 308 084**	)	
	)	
In the Matter of:	)	
	)	**IN REMOVAL**
NARCISCO-CABRERA, Armando	)	**PROCEEDINGS**
	)	
	)	
Respondent.	)	

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("Act") - *Entry without inspection.*

APPLICATION: Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents Pursuant to Section 240A(b) of the Act.

ON BEHALF OF RESPONDENT:
Audra R. Behne, Esquire
Law Offices of Audra R. Behne, PC
14724 Ventura Blvd., 2nd Floor
Sherman Oaks, California 91403

ON BEHALF OF THE GOVERNMENT:
Assistant Chief Counsel
U.S. Department of Homeland Security
606 S. Olive Street, 8th Floor
Los Angeles, California 90014

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History

On February 1, 2006, the Government initiated removal proceedings against Respondent by personally serving him with a Notice to Appear ("NTA"). In the NTA, the Government alleged that Respondent, a native and citizen of Mexico, arrived in the United States at or near San Ysidro, California on or about May 1, 2003 and was not then admitted or paroled by an immigration officer. Accordingly, the Government charged Respondent with removability pursuant to section 212(a)(6)(A)(i) of the Act for entry without inspection.

On April 7, 2006, Respondent appeared before the Court. The Court notes that Respondent had previously been in deportation proceedings in 1999. In 2002, Respondent was denied Suspension of Deportation, but was granted voluntary departure. Respondent departed pursuant to the voluntary departure order, but then reentered the United States without inspection. Respondent indicated he was now seeking relief in the form of Cancellation of Removal for Certain Nonpermanent Residents.

Respondent again appeared before the Court on August 30, 2006. Respondent, through counsel, admitted the allegations 1, 2, and 4, related to his Mexican citizenship and entry without inspection, contained in the NTA and conceded removability. Respondent denied allegation 3, stating that he arrived in the United States on April 28, 2002. Respondent designated Mexico as the country of removal. Respondent indicated he was seeking Cancellation of Removal for Certain Nonpermanent Residents or voluntary departure in the alternative.

On August 30, 2006, Respondent also filed the Application for Cancellation of Removal and filed a brief in support of his application. Respondent's brief explains that he originally entered the United States in February 1986, was placed in proceedings in August 1996, and then was

denied Suspension of Deportation and granted voluntary departure. Respondent timely appealed to the Board of Immigration Appeals ("Board"). On March 20, 2002, the Board dismissed his appeal and granted him voluntary departure to leave the United States on or before April 19, 2002. Respondent timely departed the United States on April 8, 2002 and then re-entered the Untied States without inspection on April 28, 2002. Respondent argues that he has the requisite ten years of physical presence since he had accrued ten years of physical presence prior to his April 8, 2002 departure. Respondent adds that his departure was for less than 90 days. Respondent further argues that since he was denied, as opposed to granted, Suspension of Deportation, he is not ineligible for Cancellation of Removal.

On January 16, 2007, Respondent appeared before the Court. The Government argued Respondent is not eligible for Cancellation of Removal because his physical presence ended when the Board of Immigration Appeals ordered Respondent to voluntarily depart the United States on March 20, 2002. The Court stated that it would issue a written decision regarding Respondent's eligibility for Cancellation of Removal.

II. Law and Analysis

A. Cancellation of Removal for Certain Non-Permanent Residents

Section 240A(b)(1) of the Act provides that the cancellation of removal or adjustment of status of an individual who is inadmissible or deportable from the United States is permissible if the individual:

> (A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

INA § 240A(b) (2007).

1. Continuous Physical Presence

The Court finds Respondent statutorily ineligible for cancellation of removal because he has not been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application.

The applicant's period of continuous presence ends upon whichever happens earlier, the service of the notice to appear or the commission of certain criminal offenses. See 8 U.S.C. § 1229b(d)(1). An applicant fails to maintain continuous physical presence if he "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2); see also Lagandaon v. Ashcroft, 383 F.3d 983, 986 n.1 (9th Cir. 2004). Departure from the United States under a grant of voluntary departure, including administrative voluntary departure, breaks an applicant's continuous physical presence. See Vasquez-Lopez v. Ashcroft, 343 F.3d 961, 974 (9th Cir. 2003) (per curiam); see also Matter of Romalez-Alcaide, 23 I. & N. Dec. 423 (BIA 2002) (en banc).

As the Ninth Circuit pointed out in Vasquez-Lopez, an absence pursuant to a grant of voluntary departure is "not

in-advertent, casual, or otherwise lacking in significance," but rather is "an agreement between Petitioner and the Attorney General under which Petitioner agreed to depart and not to return other than in accordance with the entry process applicable to all aliens." 343 F.3d at 974. To find no break in physical presence upon a grant of voluntary departure would be inconsistent with the nature and policy behind voluntary departure. Id.

In this case, Respondent originally entered the United States in February 1986, and was placed in proceedings in August 1996. Respondent was granted voluntary departure by the Board on March 20, 2002, and timely departed on April 8, 2002. He then reentered the United States without inspection on April 28, 2002. Respondent was served with a NTA on February 1, 2006 for entering without inspection. Respondent seeks to distinguish his case from Vasquez-Lopez and Matter of Romalez-Alcaide by arguing that in those cases the applicant had not accrued ten years of physical presence prior to the grant of voluntary departure. Respondent suggests because he was physically present for ten years prior to his voluntary departure order, he should get the benefit of that presence now. Respondent states that "an applicant for Cancellation of Removal is statutorily eligible to apply for that form of relief if voluntary departure from the United States occurred after the applicant already accrued ten years of physical presence in the United States and the absence did not violate the 90/180 day rule."

Respondent's position is not support by the statute or the case law. The statute requires that an alien be "physically present in the United States for a continuous period of not less than ten years *immediately* preceding the date of such application." INA § 240A(b)(A)(2007) (emphasis added). Respondent submitted his application for Cancellation of Removal on August 30, 2006. Thus, the Court must look to see if Respondent was physically present in the ten years *immediately* preceding his application. Respondent was

granted voluntary departure on March 20, 2002, thereby breaking his physical presence. See Vasquez-Lopez, 343 F.3d at 974. Respondent has only been continuously physically present in the United States from the date he re-entered without inspection, April 28, 2002, until the service of the NTA, February 1, 2006, amounting to less than three years. Thus, the Court finds Respondent statutorily ineligible for cancellation of removal because he has not been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application.

2. Discretion

"Cancellation of removal, like suspension of deportation before it, is based on statutory predicates that must first be met; however, the ultimate decision whether to grant relief, regardless of eligibility, rests with the Attorney General." Romero-Torres v. Ashcroft, 327 F.3d 887, 889 (9th Cir. 2003); INA § 240A(b) (2007). The Court, in its discretion, also denies Respondent's Application for Cancellation of Removal. The Court notes that on March 20, 2002, the Board dismissed Respondent's appeal for Suspension of Deportation and granted him the privilege of voluntary departure. While Respondent timely departed the United States on April 8, 2002, he then re-entered the United States without inspection on April 28, 2002. The Court finds Respondent's disregard of the immigration laws of the United States warrant an unfavorable exercise of discretion.

B. Voluntary Departure

In order to obtain voluntary departure, an alien bears the burden of establishing both that he is eligible for relief and that he merits a favorable exercise of discretion. Matter of Gamboa, 14 I&N Dec. 244, 248 (BIA 1972).

Section 240B(b) of the Act provides that the Attorney General may permit a nonimmigrant to depart the United States at his own expense, in lieu of removal, if the following requirements are met: (1) the alien has been physically present in the United States for a period of one year immediately preceding the date the NTA was served; (2) the alien is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure; (3) the alien is not an aggravated felon; and (4) the alien has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. INA § 240B(b)(1)(A)-(D); 8 C.F.R. § 1240.26(c)(1). Further, "the Attorney General shall not permit an alien to depart voluntarily tinder this section if the alien was previously permitted to so depart after having been found inadmissible under section 212(a)(6)(A)." INA § 240B(c).

In this case, Respondent entered the United States without inspection in 1986 and was found deportable, and was granted voluntary departure in 2002. Therefore, the Court finds that Respondent is ineligible for voluntary departure. See INA § 240B(c).

Accordingly, the Court issues the following orders:

ORDERS

IT IS ORDERED that Respondent's Application for Cancellation of Removal and Adjustment of Status pursuant to Section 240A(b) of the Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent be removed to Mexico based on the charges contained in the Notice to Appear.

DATED: 3-16-07

/s/
Richard D. Walton
U.S. Immigration Judge

APPENDIX C

File: A72 308 084 - Los Angeles, CA Date:
In re: ARMANDO NARCISCO-CABRERA
IN REMOVAL PROCEEDINGS
APPEAL
ON BEHALF OF RESPONDENT: Audra Behne, Esquire
APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. We adopt and affirm the March 16, 2007, decision of the Immigration Judge who found that the respondent had not met the continuous physical presence requirement for cancellation of removal. The respondent was denied suspension of deportation and left the United States under a grant of voluntary departure in 2002. The respondent then reentered the United States illegally. The lack of continuous physical presence makes the respondent statutorily ineligible for cancellation of removal.

To find no break in physical presence upon a grant of voluntary departure would be inconsistent with the nature and policy behind voluntary departure. *See Vasquez-Lopez v. Ashcroft*, 343 F.3d 961, 974 (9th Cir. 2003) (alien's departure from United States, pursuant to grant of voluntary departure under threat of coerced deportation, occasioned break in his "continuous physical presence in the United States," and thus, when alien reentered United States illegally and was apprehended, he lacked the ten years of continuous physical presence required to be eligible for cancellation of removal); I.J. at 3.

The Immigration Judge also stated that he would deny cancellation of removal as a matter of discretion due to the respondent's illegal reentry (I.J. at 4). *See Matter of*

Burbano, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"); REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302 (May 11, 2005).

Accordingly, the appeal is dismissed.

/s/

FOR THE BOARD

APPENDIX D

FILED

JUL 30 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMANDO NARCISCO-CABRERA,

Petitioner,

v.

ERIC H. HOLDER, Jr., Attorney General,

Respondent.

No. 08-73249

Agency No. A072-308-084

ORDER

Before: LEAVY, McKEOWN and CALLAHAN, Circuit Judges.

Petitioner's motion for an extension of time to file a petition for panel rehearing and/or a petition for rehearing en banc is construed as a request for an extension of time to file a motion for reconsideration of the court's May 29, 2009 order summarily denying this petition for review. *See* 9th Cir. R. 27-10. So construed, the motion is granted. Any

motion for reconsideration of the court's May 29, 2009 order is now due August 3, 2009.

If petitioner does not file the motion for reconsideration, the mandate will issue August 20, 2009. *See* 9th Cir. R. 41-2.

nmg/MOATT

APPENDIX E

FILED

OCT 26 2009

MOLLY C. DWYER, CLE
U.S. COURT OF APPEAL

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARMANDO NARCISCO-CABRERA, Petitioner, v. ERIC H. HOLDER, Jr., Attorney General, Respondent.	No. 08-73249 Agency No. A072-308-084 ORDER

Before: LEAVY, McKEOWN and CALLAHAN, Circuit Judges.

The motion for reconsideration of this court's order of May 29, 2009 is denied. *See* 9th Cir. R. 27-10.

The motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

nmg/MOATT

APPENDIX F

President's Education Awards Program

presented to

[redacted] Narciso

in recognition of

Outstanding Academic Achievement

2009

U.S. Secretary of Education

President of the United States

C. Cassidy
Principal

Park Hudson Elementary School

APPENDIX G

THE WHITE HOUSE

WASHINGTON

February 27, 2009

I am delighted to join your family, friends, and community in congratulating you on receiving the President's Education Award. By earning this honor, you have shown a deep personal commitment to educational excellence and I commend you for your hard work.

Nothing is more important to our Nation's long-term success than educating our future leaders. Your commitment to learning will help you meet the educational and professional demands in your future and will help lead America to a better day.

I am confident that you will build on this achievement as you strive for even higher goals in the future. I wish you all the best for continued success in the years ahead.

/s/ *Barack Obama*

APPENDIX H

Los Angeles Unified School District
Park Western Place Elementary School
Harbor Math/Science Magnet
1214 Park Western Place
San Pedro, California 90732
(310) 833-3591 Fax: (310) 833-6413

Christine Cassidy
Principal

Dear Parents,

Now that your child has been identified either Intellectually, High Achieving or Specific Academically gifted, he/she will receive a special program in his/her classroom. The techniques are recommended in state standards and based on student interests, needs and abilities. The school program includes Clustering and Differentiation. Clustering is grouping students with similar needs, interests, or abilities in the same classroom. Differentiation is adapting the existing curriculum to include complexity, depth, novelty, and acceleration to meet the special needs of the students.

The options available with this identification are Magnet Centers or Advanced Studies Programs. In order to apply for a Magnet Center it is necessary to fill out a Choices brochure which is sent to all families with students enrolled in Los Angeles Unified School District. The brochure comes to the home during the second week in December. In order to apply to the Advanced Studies Program it is necessary to go to the school of choice and fill out an application there.

If you have any questions, please feet free to call me at, (310) 833-3591.

Sincerely,

/s/ _____
Susan Goldberg
Gifted Coordinator